United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

77-1016

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

DOCKET NO. 77-1016

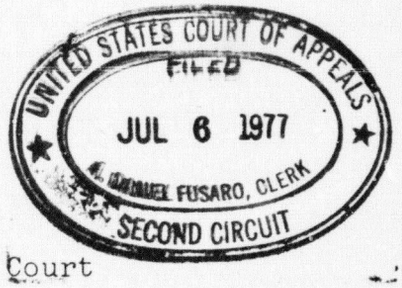
UNITED STATES OF AMERICA,

APPELLEE,

-vs-

LUIS E. CHICO and GAIL A. COLELLO,

APPELLANTS.



On Appeal From The United States District Court
For the District of Connecticut

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

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P E T I T I O N

The appellants, Luis E. Chico and Gail A. Colello, petition for a rehearing of their appeal and alternatively suggest rehearing en banc on the ground that the panel decided an important and recurring issue in the administration of criminal justice in a manner contrary to the unambiguous language of an Act of Congress, inconsistent with this Court's precedents and in conflict with all reported cases on point. The panel decision, slip op. 4275 (June 20, 1977), held:

> Article IV(e) of the [Interstate Agreement on Detainers] does not apply to a case where a prisoner is removed from

> the prison of a state for a few hours [each time] to be arraigned, plead and be sentenced in the federal court without ever being held at any place of imprisonment other than that of the sending state and without interruption of his rehabilitation there.

Id. at 4280. The Court thus did not reach the question whether "appellants waived their right to relief under the Agreement by not raising it prior to pleading guilty . . . ." Id. at 4280 n.6.[1/]

The Court's holding is founded on the conclusion that, "For purposes of the Act, the situation is the same as if they had remained continuously in state prison. Cf. United States v. Sorrell, 413 F. Supp. 130 (E.D.Pa. 1976); United States v. Kenan, 422 F. Supp. 226 (D.Mass. 1976)." Id. at 4279. The two cases

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1/ The Court recited that appellants sought relief "pursuant to 28 U.S.C. §2255," id. at 4276, and said that it would "not reach the government's [contention] ... that such relief is not available under the Agreement by seeking a writ pursuant to 28 U.S.C. §2255." Id. at 4280 n.6. The fact of the matter is, however, that appellants never sought to attack their convictions collaterally under §2255. At the time the government charged them with probation violations, §2255 could be invoked only by filing a separate civil action. See, e.g., United States v. Heflin, 358 U.S. 415, 418 n.7 (1959); Johnson v. United States, 373 F. Supp. 1057, 1059 (D.Del. 1974). (Since Feb. 1, 1977, on the other hand, the Supreme Court and Congress have redefined §2255 as a simple postconviction motion in the criminal case. See Fed. R. §2255 P.3 and Adv. Comm. Note.) In this case, by contrast, appellants were raising a complete defense to a charge brought against them, and their right to do so cannot be curtailed by any limitations on the scope of an affirmative, statutory collateral remedy. See Pollard v. United States, 352 U.S. 354 (1957); cf. Moore v. East Cleveland, ____ U.S. ____, ____ n.5 (May 31, 1977)(criminal defendant not foreclosed from raising a defense by previous failure to seek civil remedy).

cited,[2/] however, as well as United States v. Rodriguez, Crim. No. H-76-32 (D.Conn., Dec. 15, 1976)(Blumenfeld, J.), which appear to be the only precise precedents, stand for the exact opposite proposition.[3/] Moreover, the panel's conclusion finds no support in the ratio decidendi of the prior decisions of this Court applying the Agreement. Neither United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), nor United States v. Ford, 550 F.2d 732 (2d Cir. 1977), depended on a weighing of the particular facts of each prisoner's detention in one jurisdiction or the other. The discussion in Ford of the Agreement's purposes served to explain the Congressional decision to enact it, including the provision requiring the severe dismissal sanction when its terms were violated. In this case, the Agreement was not complied with and nothing in Mauro or Ford suggests that the particular facts of the case remove it from Article IV(e)'s ambit.

2/ Sorrell is pending decision by the Third Circuit en banc after having been reargued prior to decision by the original panel.

3/ Thus, the Court's use of the introductory signal "Cf." rather than "Contra or But see" is puzzling. As this Court recently remarked:

> the "cf." signal preceding the citation makes its exact meaning uncertain, see A Uniform System of Citation 7 (12th ed. 1976)("Cf.[means][c]ited authority supports a proposition different from that in text but sufficiently analogous to lend support .... 'Cf.' should not be used without any explanatory parenthetical.")

Gates v. Henderson, No. 76-2065 (2d Cir., Jan. 12, 1977), slip op. 1345, 1353, rehearing en banc on other grounds pending.

More important, as a matter of statutory interpretation, the panel's decision is unsupportable. After evaluating the problem of correctional detainers, Congress elected to enact the Agreement, including Article IV(e), which contains the strict requirement of dismissal whenever a prisoner produced for trial at the request of a prosecutor in another jurisdiction is "returned to the original place of imprisonment" prior to disposition of the indictment which had been filed as a detainer. Article IV makes no provision for a case by case consideration of whether a prisoner has suffered actual prejudice by the Agreement's violation--the statutory sanction is automatic and inflexible: "If trial is not had . . . prior to the prisoner's [return] . . . such indictment shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." An Article IV(e) dismissal is not a judicially fashioned remedy, it is a strict Congressional command for the benefit of criminal defendants that if certain events occur, there shall be no prosecution. Thus, the panel poses the wrong question when it asks "whether Article IV(e) must be interpreted as requiring . . . dismiss[al]." Slip op. at 4277 (emphasis added). Rather, such a provision must be strictly construed against the government and liberally in favor of the defendant. Cf. United States v. Marion, 404 U.S. 307, 322 n.14 (1971); Toussie v. United States, 397 U.S 112, 115 (1970)(statutes of limitations).

The panel opinion's emphasis on the absence of any federal "imprisonment" in this case, while highlighting a factual difference between this case and Mauro or Ford, demonstrates no distinction legally pertinent under the Agreement. First, nothing in Article IV(e)'s use of the expression "original place of imprisonment" suggests that only an "imprisonment" in the receiving state will trigger the effect of that provision. In context, the expression means no more than "the same place where previously imprisoned." The degree of custody maintained in the receiving state is accorded no importance under the Agreement. Indeed, "custody" in the receiving state and not "imprisonment" is precisely what the Act refers to. Article IV(a) provides that the receiving state is "entitled to have [an eligible] prisoner . . . made available . . . upon presentation of a written request for temporary custody or availability . . . ." (emphasis added). Under Article V(a), "the . . . sending State shall offer to deliver temporary custody of such prisoner . . . ." (emphasis added). See also Article IV(b)("request for custody or availability"). Surely, there is no dispute that while the appellants were handcuffed in the automobile and courthouse lockup of the United States Marshal or present in the District Court they were in the "temporary custody" of the United States. Thus, when they were returned to their "original place[s] of imprisonment" twice before the disposition of their federal

cases, the Agreement was violated, leaving the indictment against them of no "further force or effect."[4/]

CONCLUSION

Because the panel decision fundamentally misapprehends the governing law, the Court should rehear the case and reverse the judgment. Because the case presents a question of exceptional importance arising in the wake of this Court's Mauro decision--a question which the Third Circuit is now considering en banc--appellants suggest a rehearing en banc.

Respectfully submitted,

Peter Goldberger

Dated: July 5, 1977

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CERTIFICATION

I mailed two copies of the foregoing Petition to Thomas Smith, Esq.. Assistant United States Attorney, 450 Main Street, Hartford, Connecticut, 06103, this 5th day of July, 1977.

Peter Goldberger

4/ With the indictment thus vitiated, the District Court lacked jurisdiction to find them in violation of probation or to extend the term of supervision. See United States v. Macklin, 523 F.2d 193, 196 (2d Cir. 1975), and cases cited in the appellant's principal brief.

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APPENDIX TO PETITION FOR REHEARING
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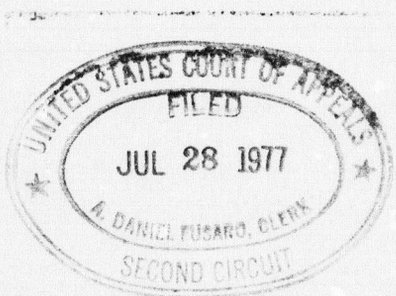
Opinion of Hon. M. Joseph Blumenfeld in
United States v. Rodriguez, Crim. No. H-76-32 (D.Conn., Dec. 15, 1976)



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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. H-76-32
RAFAEL RODRIGUEZ	:	

RULING ON MOTION TO DISMISS

The defendant, Rafael Rodriguez, moves to dismiss a federal indictment charging him with conspiracy to violate the narcotics laws, 21 U.S.C. § 846. The motion is based upon Article IV (e) of the Interstate Agreement on Detainers, 18 U.S.C. App. The recent Second Circuit decision in United States v. Mauro, Docket No. 76-1251 slip op. 266 (2d Cir., October 26, 1976), in which the court considered an identical claim, establishes the controlling law. Lewis v. Rockefeller, 431 F.2d 368, 371 (2d Cir. 1970).

I.

On February 27, 1976, the defendant was sentenced in Connecticut state court to a prison term for possession of narcotics in violation of Conn. Gen. Stat. § 19-481(a). Pursuant to this sentence, he was incarcerated at the Connecticut Correctional Institution at Somers. On March 25, 1976, Rodriguez was indicted by a federal grand jury for conspiring to violate the narcotics laws, 21 U.S.C. § 846. On August 30, 1976, a federal detainer was lodged at Somers.[1/]

1/ Government's Memorandum in Opposition, Nov. 15, 1976, at 2.

On September 20, 1976, the defendant was transported by federal marshals, pursuant to a writ of habeas corpus ad prosequendum obtained by the government, from Somers to the United States District Court in Hartford for purposes of arraignment. Following a plea of not guilty to the federal charge, Rodriguez was returned to state custody at Somers, where he is presently incarcerated.

II.

Article IV of the Interstate Agreement on Detainers provides a method for prosecutors to secure prisoners serving sentences in other jurisdictions for a prompt trial within 120 days after their arrival in the receiving jurisdiction. Article IV (e) provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V (e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Relying on this provision, the defendant moves to dismiss the federal indictment.

In United States v. Mauro, supra, the Second Circuit considered an identical claim and held that the federal charges must be dismissed with prejudice. The court found the language of Article IV (e) "clear," id. at 273, and recognized "that Article IV (e) creates no exceptions to the requirement

that the defendant not be returned to state custody untried." Id. at 271-72 n.6. Despite this direct language, the government attempts to distinguish Mauro and argues that Article IV (e) is inapplicable to the present case.

The government's first contention is that Article IV (e) is inapplicable because the District of Connecticut and the State of Connecticut are geographically identical. The argument is that Rodriguez never left the State of Connecticut nor was he "brought into" the District of Connecticut. However, for purposes of the Interstate Agreement on Detainers, the United States and Connecticut are two separate states. 18 U.S.C. App., Article II (a); United States v. Mauro, supra at 268. The government confuses jurisdiction with geography. At the insistence of the government, the defendant was taken from state custody into federal custody for arraignment and then returned to state custody. Therefore, the Interstate Agreement is applicable.

The government also tries to distinguish the facts of this case from those in Mauro. It emphasizes that the period of time that the defendant was in federal custody was short and that the defendant was never requested for trial, only for arraignment. These arguments must fail because, as I noted above, the Mauro court found that there are no exceptions to Article IV (e).

Finally, the government argues that the practicalities of the situation require that Article IV (e)'s harsh remedy

not be invoked in this case. In response to this contention, I repeat the following statement from Judge Mulligan's opinion in Mauro:

> "[The legislative history] reflects, in our view, a recognition by some members of Congress that perhaps the Congress should not have acted as it did--that the sanctions of Article IV in particular are discomfiting to the Government. However, it is not our role to extricate the United States from the unequivocal terms of the Agreement enacted by Congress."

United States v. Mauro, supra at 277.

III.

The sanction of Article IV (e) is applicable to the present case. Therefore, the indictment charging Rafael Rodriguez with the federal crime of conspiring to violate the narcotics laws is dismissed with prejudice.

It is SO ORDERED.

Dated at Hartford, Connecticut, this 15th day of December, 1976.

M. Joseph Blumenfeld
United States District Judge

I hereby certify that the foregoing is a true copy of the original document on file. Date: 1-24-77

Clerk

By: Deputy Clerk